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ALEXANDER L. STEVAS,
CLERK

No. 84-41

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

UNITED STATES OF AMERICA,
Plaintiff/Respondent

v.

CLARENCE MOORE, individually, and
d/b/a LOG MOUNTAIN MINING COMPANY,
Defendant/Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SIXTH CIRCUIT

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July 2, 1984

6 4 pp

QUESTION PRESENTED

That it was error to grant Summary Judgment in the face of the material question of waiver raised by Petitioner and the issues of the constitutionality of the Act in question and the failure of the government to follow the requirements of the Act and related regulations.

PARTIES

Petitioner: Clarence Moore

Respondent: United States of America

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REFERENECE TO OFFICIAL AND UNOFFICIAL REPORTS OF LOWER COURT OPINION

The text of the Orders, Memoranda, and Opinions of the lower courts are reproduced in the Appendix. The district court's memorandum is reported at 550 F.Supp. 811 (E.D. Tenn. 1982). The order of the Court of Appeals is unpublished.

STATEMENT OF GROUNDS ON WHICH JURISDICTION INVOKED

The Petitioner was found liable for a civil penalty by final order of a district court pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Sec. 1201 et seq., Petitioner appealed to the United States Court of Appeals for the Sixth Circuit

pursuant to 28 U.S.C. Sec. 1291.

The Court of Appeals affirmed the district court's ruling by a final order filed on April 4, 1984. The right of appeal is not available in this action.

The Petitioner respectfully seeks further review of this case by requesting the Court to grant this Petition for Writ of Certiorari, submitted pursuant to 28 U.S.C. Sec. 1254(1), timely filed under 28 U.S.C. Sec. 2101(c).

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS

(All references to the record to the Joint Appendix filed by the parties with the Court of Appeals)

The Petition of Clarence Moore, arises from the granting of Summary Judgment on July 21, 1982, to the United States, by the United States District Court for the Eastern District of Tennessee, Northern Division. The Petitioner filed a Notice of Appeal on August 4, 1982. The United States Court of Appeals for the Sixth Circuit affirmed on April 4, 1984.

The Complaint was for collection of civil penalties allegedly owed by Petitioner pursuant to 30 U.S.C. Sec. 1268(d) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Sec. 1201 et seq. (J.A., p. 2). The civil penalties were allegedly owed in accordance with 30 U.S.C. Sec. 1268(b) and (c). (J.A., p. 2). The United States sought penalties in the amount of Twenty Thousand, Seven Hundred and Twenty Dollars ($20,720.00). (J.A., p. 5).

The original Complaint was filed against Log Mountain Mining Company on March 18, 1982. On motion of the United States filed July 12, 1982, an Order was entered on July 21, 1982, amending the Complaint to add Clarence

Moore, individually. (J.A., pp. 66, 73).

Petitioner filed an Answer to the Complaint on May 5, 1982, and filed a First Request for Production of Documents on May 6, 1982. (J.A., pp. 15, 20).

The United States moved for Summary Judgment and filed a Memorandum in Support of Motion for Summary Judgment on June 22, 1982. (J.A., pp. 49, 50). Petitioner filed a Response to Motion for Summary Judgment and accompanying Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, with an affidavit of Clarence Moore attached as Exhibit I, on July 7, 1982. (J.A., pp. 54, 55, 61).

Petitioner amended the

Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, and the United States filed a Reply Memorandum on July 20, 1982. (J.A., pp. 67, 69).

On July 21, 1982, the Honorable Robert L. Taylor, presiding Judge of the United States District Court, entered an Order granting Summary Judgment in favor of the United States for reasons stated in a Memorandum Opinion filed the same day. (J.A., p. 6). Petitioner, Clarence Moore, filed a Notice of Appeal on August 4, 1982 seeking reversal of the Summary Judgment in the district court (J.A., p. 14), but the Sixth Circuit Court of Appeals affirmed on April 4, 1984.

II. STATEMENT OF THE FACTS

Due to the summary disposition below, the relevant facts to this case are contained in the Affidavit of Clarence Moore, filed on July 7, 1982 as Exhibit I to Petitioner's Memorandum in Opposition to the United State's Motion for Summary Judgment, the United State's Answers to Defendant's First Set of Interrogatories, filed on June 18, 1982, the Complaint and Answer. (J.A., pp. 61; 30-48; 2-5; 15-19).

Clarence Moore avers in his Affidavit that the confusion generated by the notices [proposed notices of assessment] sent to him by the governnment resulted in an unknowing waiver of his appeal rights. (J.A., p. 61). Also, due to the confusion,

Clarence Moore avers that he believed civil penalties applied only to unabated violations [of 30 U.S.C. Sec. 1201 et seq.] and to serious threats to the environment. (J.A., p. 61). Finally, Clarence Moore avers that the delays by the government in assessing proposed penalties further served to put him off guard and substantially contributed to his inaction relating to the penalties. (J.A., p. 61).

Notice of Violation (NOV) 80-2-32-16 was issued on April 23, 1980, citing Petitioner for two bookkeeping violations of 30 U.S.C. Sec. 1201 et seq., the Surface Mining Control and Reclamation Act (hereinafter "the Act"). (J.A., pp. 30, 31). The violations cited in NOV 80-2-32-16 were terminated

on April 29, 1980. (J.A., p. 31). The Office of Surface Mining (OSM) sent out a Notice of Proposed Assessment for $880 on August 20, 1980, (J.A., p. 32), 119 days after issuing NOV 80-2-32-16.

NOV 80-2-32-8 was issued on February 14, 1980, for tweleve violations of the Act ranging from minor "paperwork" violations to more important violations. (J.A., p. 33). Violations 1, 4, and 7 of NOV 80-2-32-8 were terminated on April 23, 1980, and violations, 2, 3, 5, 8 and 10 were modified to extend the time for abatement; on April 29, 1980, violations 6 and 9 were terminated; violations 2, 3, 8, 10 and 12 were terminated on May 20, 1980; violations 5 and 11 were terminated on June 20, 1980. (J.A., pp.

34, 35, 36). On April 11, 1980, however, the OSM sent a Notice of Proposed Assessment for $12,180, (J.A., p. 34), this coming 55 days after the issuance of NOV 80-2-32-8. The OSM reduced the assessment to $8,380 at an informal assessment conference on June 23, 1980. (J.A., p. 36).

NOV 80-2-46-16 was issued on April 2, 1980, for four violations of the Act. (J.A., p. 37). The violations were modified to extend the time for abatement on May 20, 1980, and were terminated on June 23, 19890. (J.A., pp. 37, 38). However, a Notice of Proposed Assessment for $1,860 was sent on June 19, 1980, (J.A., p. 39), 79 days after NOV 80-2-46-16 was issued.

NOV 80-2-32-29 was issued on

July 17, 1980, for three violations of the Act. (J.A., p. 40). Violation 3 was modified on August 4, 1980, because of a discrepancy in engineering specifications. (J.A., pp. 40, 41). Violation 1 was terminated on October 7, and the remaining violations were terminated on November 7, 1980. (J.A., p. 42). The OSM sent a Notice of Proposed Assessment for $6,100 on September 3, 1980, 49 days after NOV 80-2-32-29 was issued.

NOV 80-2-53-5 was issued on April 2, 1980, citing six violations of the Act. On April 23, 1980, violations 1, 5 and 6 were terminated, as were violations 2 and 3 on July 2, 1980. (J.A. pp. 43, 44). Violation 4 was not terminated until January 20, 1982.

(J.A., p. 45). A Notice of Proposed Assessment for $2,300 was sent on August 20, 1980, 140 days after NOV 80-2-53-5 was issued.

NOV 80-2-53-12 was issued on April 24, 1980, citing two violations of the Act, and both violations were terminated on July 2, 1980. (J.A., pp. 45, 460. A Notice of Proposed Assessment for $1,200 was sent on August 20, 1980, 118 days after NOV 80-2-53-12 was issued.

The United States alleged that in each instance heretofore described, the Petitioner failed to pre-pay into escrow the respective proposed amounts of assessment and, therefore, waived all legal rights pursuant to 30 U.S.C., Sec. 1268(c). (J.A., pp. 2-4).

Petitioner admittted that no amount had been paid into escrow but denied that a waiver of all legal rights was a necessary result of such failure and denied that the proposed assessments were due and owing. (J.A., pp. 15-18).

ARGUMENT

I. INTRODUCTION

Petitioner respectfully submits that the requirements of Rule 56 of the Federal Rules of Civil Procedure precluded summary judgment in this case. First, the question of whether Petitioner knowingly waived his right to appeal under the provisions of the Act, is a question of fact which has not been determined. Second, the constitutional question raised by Petitioner has not been definitively ruled upon by this Court. Third, the Office of Surfacee Mining failed to follow the mandate of 30 U.S.C. Sec. 1268(c) and its own regulations in assessing proposed penalties. Petitioner contends that the

question of waiver, the constitutional issue, and the failure of the OSM to comply with the Act and implementing regulations precluded the proper granting of summary judgment.

II. THE RECORD RAISES A MATERIAL QUESTION OF FACT IN THAT THE DEPARTMENT OF THE INTERIAL FAILED TO NOTIFY PETITIONER IN A MEANINGFUL WAY OF VIOLATIONS AND RIGHTS, AND SUCH FAILURE LEAD TO UNKNOWING NONCOMPLIANCE OF THE ACT AS APPLIED BY THE OFFICE OF SURFACE MINING.

Initially, it is important for the Court to apply two principles in considering the disposition of the United State's Motion for Summary Judgment. First, the United States, as the moving party, had the burden of showing the absence of any material fact in this case. Adicke v. Kress & Co., 398 U.S. 144, 153 (1970). Second, in a

summary judgment proceeding, all inferences which may be drawn from the record should be looked at in the light most favorable to the opposing party, the Petitioner in this case. Poller v. Columbia Broadcasting Co., 368 U.S. 464, 473 (1962).

The United States contended that the record demonstrated that there was no genuine dispute as to any material fact. The United States contended that Petitioner's failure to avail itself of the various remedies provided by the Act foreclosed its appeal to the District Court, particularly the failure to pre-pay amounts of proposed penalties into escrow. The failure to pre-pay is made a waiver of all legal rights to contest

any violation of the amount of any penalty under 30 U.S.C. Sec. 1268(c).

The record shows that Defendant's so-called waiver of legal rights was unknowingly made and caused by the confusion surrounding the notices sent to Petitioner, and the inaction and unwarranted delay in assessing penalties. (J.A., p. 61). Such notices served only to confuse and frustrate their purpose, which ostensibly was to definitively inform Petitioner of his rights.

The confusion involved in this case is exemplified by the one instance an administrative hearing was held after a notice of violation was issued. At an informal assessment conference held on June 23, 1980, in connection with NOV

80-2-32-8 and a proposed assessment amount of $12,180, was reduced to $8,380. (J.A., p. 36). This one instance of Petitioner's recourse to available administrative avenues serves to lend credence to the averments in his Affidavit that the notices and actions of the United States confused rather than enlightened.

It makes little sense that Petitioner would forego administrative remedies when his sole experience with such proceedings resulted in a reduction of a proposed penalty, unless he in fact did not understand the alleged import of failing to exercise such rights and was confused by the paperwork and ambiance of the OSM.

Petitioner put this question

before the Court in his Affidavit, thus raising a material question of fact. It is respectfully submitted that the important question of intelligent waiver of legal rights is a material question of fact which cannot be decided by summary motions and supporting papers.

III. CONDITIONING ACCESS TO JUDICIAL REVIEW UPON THE FULL PAYMENT OF A CIVIL PENALTY IS UNCONSTITUTIONAL, THUS SUMMARY JUDGMENT IS NOT AVAILABLE AS A MATTER OF LAW.

The provision of 30 U.S.C. Sec. 1268(c) which conditions access to courts for review of agency action on the full payment of a penalty determined by the agency violates the Due Process Clause of the Fifth Amendment. In addition, such a requirement violates the Equal Protection Clause of the Fourteeneth Amendment as applied through

the Fifth Amendment.

The Fifth Amendment contains no equal protection clause, but "it does forbid discrimination that is 'so unjustified as to be violative of due process." Shapiro v. Thompson, 394 U.S. 618, 642 (1969). A classification which is invalid under the Equal Protection Clause of the Fourteenth Amendment is also invalid under the Due Process Clause of the Fifth Amendment. Johnson v. Robison, 415 U.S. 361, 364 n. 4 (1973).

To justify a classification under the Equal Protection Clause of the Fourteenth Amendment it "must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the

object of the legislation, so that all persons similarly circumstanced shall be treated alike." Reed v. Reed, 404 U.S. 71, 76 (1971).

In this case, the United States would deprive Petitioner of the right to judicial review given to all persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action," pursuant to 5 U.S.C. Sec. 702. Mine operators subject to the Act are singled out among litigants so that access to judicial review is dependent upon the actual advance payment of a disputed penalty. Such a final and harsh requirement is unreasonable, arbitrary and capricious.

Although judicial review is often conditioned on the giving of

security, such security is a far cry from giving up, in cash and in full, an amount which has been assessed by an agency and to which an aggrieved party objects.

The less restrictive alternative of requiring a performance bond to insure that penalties will be paid and, more importantly, that any environmental damage will be restored is provided for in 30 CRF Sec. 800 et seq. Thus, the pre-payment provision is overly burdensome and unnecessary.

FAILURE TO NOTIFY AN OPERATOR OF THE PROPOSED AMOUNT OF ASSESSMENT WITHIN THIRTY DAYS OF ISSUANCE OF A VIOLATION DEPRIVES THE GOVERNMENT OF ANY RIGHT TO SUCH PENALTY.

The first sentence of 30 U.S.C. Sec. 1268(c) provides that: "Upon the issuance of a notice or order charging

that a violation of the Act has occurred, the Secretaty shall inform the operator within thirty days of the proposed amount of said penalty...."(Emphasis added).

The Office of Surface Mining considered that it was the intention of Congress by the thirty-day notification requirement that no penalties were to be assesed beyond thirty days. Federal Register, September 4, 1980, 58781. Recognizing that confusion and unfairness could result from past practices related to inspection, re-inspection and proposed penalties, the Office announced its intention to restrict failure-to-abate penalties to a maximum of thirty days, modify existing assessments and grant hearing and

conference requests on any recomputations. Id.

The concern shown by OSM over the mandate of 30 U.S.C. Sec. 1268(c) that "the Secretary shall inform the operator within thirty days of the proposed amount of said penalty" indicates that Congress intended that the Office had a duty to inform operators of proposed assessments within the explicit time period.

The proposed amount of the penalties on the notices of violation under consideration in this cae were sent to Petitioner anywhere from 55 days to 140 days from the issuance of such violations. Surely, if operators are expected to follow statutory and regulatory provisions, the administering

agency, as enforcer, should be required to adhere to the express requirements of the Act and related regulations, particularly, when a failure to do so has resulted in a purported waiver of rights under the same regulatory scheme.

CONCLUSION

For the foregoing reasons and in light of the Supreme Court's reservation of the question of constitutionality of 30 U.S.C. Sec. 1268(c) in Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264 (1981), it is respectfully requested that the Petition be granted.

RESPECTFULLY SUBMITTED, this the 2nd day of

July 2, 1984.

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APPENDIX

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Order of District Court

Memorandum of District Court

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30 USC Sec. 1268(b)
30 USC Sec. 1268(c)
30 USC Sec. 1268(d)
30 USC Sec. 1271(a)

Rule 56, Federal Rules of
Civil Procedure

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CLARENCE MOORE, individually, and d/b/a LOG MOUNTAIN MINING COMPANY, Defendant-Appellant.	ORDER

BEFORE: JONES AND WELLFORD, Circuit Judges; and CELEBREZZE, Senior

Circuit Judge

Moore appeals from the grant of summary judgment to the Government in this Surface Mining Control and Reclamation Act case. The district court found the statute at issue to be constitutional. This appeal has been referred to a panel of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit. After an examination of the record and the briefs, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

The Department of the Interior brought this action to recover assessments against Moore for violation of the Act. Moore challenged the constitutionality of the requirement that he pre-pay the assessment before obtaining review. This Court has

recently held that this requirement is constitutional. Blackhawk Mining co., Inc. v. Andrus, 711 F.2d 753 (6th Cir. 1983). Therefore, Moore has waived his right to review of the assessments. 30 U.S.C. Sec. 1268(c).

Moore also alleges that he did not knowingly waive his rights. The administrative record contains a letter clearly informing Moore of the pre-payment requirement. So Moore's argument is without merit.

The judgment of the district court is affirmed under Rule 9(d)(3), Rules of the Sixth Circuit, because the issues are not substantial and do not require oral argument.

ENTERED BY ORDER OF THE COURT

/s/By:John P. Hehman, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CIV.
	)	3-81-520
LOG MOUNTAIN MINING COMPANY,	)	
	)	

O R D E R

For the reasons stated in a memorandum opinion this day passed to the Clerk for filing, it is ORDERED that plaintiff's motion for summary judgment be, and the same hereby is, granted. It is further ORDERED that judgment enter in favor of plaintiff for $20,720.00.

Enter:

/s/By: Robert L. Taylor
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	CIV.
	)	3-81-350
LOG MOUNTAIN MINING COMPANY	)	

M E M O R A N D U M

The United States brought this action to collect civil penalties in the amount of $20,720.00 assesed against defendant. The case is presently before the Court on plaintiff's motion for summary judgment. Plaintiff has also moved to amend its pleadings to name Clarence Moore, individually d/b/a Log Mountain Mining Company, as defendant. Plaintiff states that the amendment is necessary because Log Mountain Mining Company is a sole proprietorship of Clarence Moore rather than a

corporation. The motion to amend is granted so that the pleadings will reflect the true parties in interest.

Defendant does not contest the violations which are the subject of the penalties. It is undisputed that the Secretaty of Interior has assessed the $20,720 in penalties against defendant for Notices of Violation 80-2-32-16, 80-2-32-8, 80-2-46-14, 80-2-32-39, 80-2-53-5 and 80-2-53-12. It is also undisputed tht defendant failed to exhaust his appeal rights for challenging these penalties. Relying on defendant's failure to challenge the violations or penalties through the exercise of his appeal rights, plaintiff contends that defendant has waived his right to contest the violations. 30 U.S.C. Sec. 1268(c).

Defendant contends that 30 U.S.C. Sec. 1268(c) is unconstitutional

as a denial of due process and equal protection. The challenged provision provides that

> Notice; waiver. Upon the issuance of a notice or order charging that a violation of the Act has occurred, the Secretary shall inform the oerator within thirty days of the proposed amount of said penalty. The person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Seretary for placement in an escrow account. If through administrative or judicial review of the proposed penalty, it is determined that no violation occurred, or that the amount of the penalty should be reduced, the Secretary shall within thirty days remit the appropriate amount to the poerson, with interest at the rate of 6 percent, or at the prevailing Department of the Treasury rate, whichever is greater. Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

Defendants attacks the requirement that he pay the amount of the proposed penalty into escrow. He contends that the escrow provision is unreasonable, is a denial of acces to the courts and is a deprivation of property without due process, citing Fuentes v. Shevin, 407 U.S. 67 (1972).

Four district courts have upheld the escrow provision. United States v. Hill, 533 F.SASupp. 810 (E.D. Tenn. 1982); United States v. Thompson Brothers Coal Co., Inc., 532 F.Supp. 979 (W.D.Pa. 1982); B & M Coal Corp. v. Office of Surface Mining Reclamation and Enforcement, 531 F.Supp. 677 (S.D. Ind. 1982); Blackhawk Mining Co. v. United States Department of Interior, No. 79-136 (E.D. Ky. February 11, 1982). We have found no case holding this section unconstitutional after the Supreme Court's decision in Hodel v. Virginia

Surface Mining and Reclamation Association, 452 U.S. 264 (1981).

The escrow provision was viewed by Judge Edward Dumbauld as

> an appropriate means of discouraging frivolous resort to an additional avenue of delay for the purpose of prolonging the collection process and postponing the painful moment of payment. Past experience, as the legislative history shows, indicated the wisdom of enacting such a provision. 95th Cong., 1st Sess., S.Rep. No. 95-128, 58-59(1977).
>
> The temporary loss of use of a small sum for a short time is surely de minimis in comparison to the other expenditures and outlays which a coal operator is obliged to make in order to carry on business. If successful in upsetting or reducing the penalty he is reimbursed the amount prepaid, together with interest at 6% or that on Treasury bills, whichever is higher. This hardship is insufficient to constitute deprivation without due process.

532 F.Supp. at 979.

The validity of the escrow provision should be determined by

looking to the reasonableness of the statutory scheme and its administrative regulations. Judge Frank Wilson described thee procedural safeguards provided by the various levels of administrative review as follows:

> "The procedures followed by the Secretary in assessing civil penalties, and the administrative and judicial appeal rights afforded mine operators, are set forth in 30 U.S.C. Secs 1268, 1275-76; 30 C.F.R. Secs. 723.1 et seq.; and 43 C.F.R. Secs. 4.1100 et seq. These procedures and appeal rights become applicable whenever a mine operator or permittee is issued a notice of violation or a cessation order under 30 U.S.C. Sec. 1271(a).
>
> "I. Within ten days of service of a notice or order, the permittee may submit written information concerning the violation(s) to the Office of Surface Mining Assessment Office. Any such information must be considered by the Assessment Office in determining whether to assess a civil penalty and how large a penalty to assess. 30 C.F.R. Sec. 723.16(a). Within 30 days of the issuance of the notice or order, the

Assessment Office must inform the permittee of its decision to assess a penalty and must serve on the permittee a copy of the proposed assessment. 30 U.S.C. Sec. 1268(c); 30 C.F.R. Sec. 723.16(b).

"II. If the notice or order require the cessation of mining an informal public hearing must be held upon the request of the permittee, within 30 days of service of the citation. 30 U.S.C. Sec. 1271(a)(5); 30 C.F.R. Sec. 722.15. The hearing is conducted by a supervisory OSM employee, and the permittee may request that the hearing be held on the mine site. The hearing officer must issue his decision affirming, vacating, or modifying the citation within five business days. 30 C.F.R. Sec. 722.15(f).

"III. Also within 30 days of the issuance of any notice or order, the permittee may apply for formal review of the citation under 30 U.S.C. Sec. 1275; 43 C.F.R. Secs. 4.1160 et seq. The permittee may receive a full, adversarial, evidentiary hearing before an impartial administrative law judge, who reviews the validity of the notie or order and has the power to vacate, affirm, or modify the citation. Temporary relief may be requested under 30 U.S.C. Sec. 1275(c); 43 C.F.R.

Secs. 4.1260 et seq.

Appeals to an administrative review board and judicial review rights are also available 43 C.F.R. Secs. 4.1271 et seq.; 30 U.S.C. Sec. 1276(a))(2).

"IV. Within 15 days of receipt of a notice of proposed assessment of civil penalty, the permittee may request an informal conference to review the amount of the penalty. 30 C.F.R. Sec. 723.17(a). The conference is conducted by an OSM employee who has had no previous connection with the case. Any information presented by the permittee at the conference must be considered by the Assessment Office in deciding whether to affirm, vacate, rqaise, or lower the penalty 30 C.F.R. Sec. 723.17(b).

"V. Finally, either within 15 days of the conclusion of th assessment conference (if one has been requested) or within 30 days of receipt of the notice of proposed assessment of civil penalty (if no conference has been requested), the permittee may apply for formal review of both the validity of the citation and the amount of the proposed penalty. 30 U.S.C. Sec. 1268(c); 30 C.F.R. Sec. 723.18; 43 C.F.R. Secs. 4.1150 et seq. A full, adversarial,

> evidentiary hearing is held, as under remedy III described above. As a precondition of this final administrative remedy only, the permitee is required to pay the amount of the proposed penalty into an escrow account, 30 U.S.C. Sec. 1268(c); 43 C.F.R. Sec. 4.1152. If the permittee succeeds in having the penalty reduced or eliminated in this formal review process, any amount determined not to be owed must be refunded to the permittee with interest at the prevailing Department of Treasury rate. Id. Appeals to an administrative review board and judicial review are available here as well. 43 C.F.R. Sec. 4.1270; 30 U.S.C. Sec. 1276(a)(2)."
> (Footnote omitted).

814 F.Supp. at 814-15. Both the notices of violation an the notices of proposed assessment explained these administrative remedies to defendant.

The record indicates that defendant availed himself of only one of the various administrative remedies. He requested and received an informal assessment conference for Notice of Violation 8-2-32-8. As a result of the

conference, the amount of the proposed penalty was reduced from $12,180 to $8,380.

We agree with the views expressed in the cases cited above that the adminitrative review available to defendant satisfies the requirements of due process.

Defendant's equal protection argument is that Sec. 1268(c) creates an arbitrary and unreasonable classification. He does not explain what the classifications are and we are unable to find that the statute creates any classifications. See Unites States v. Thompson Brothers Coal Co., supra. This argument is likewise without merit.

Defendant asserts in his affidavit that he did not knowingly waive his rights to appeal. He states that the notices were confusing and that he was unaware the he would have to pay

for minor violations or for violations affecting the environment but which had been corrected. Samples of two notices received by defendant are attached as exhibits. Exhibit III is a notice of the administrative relief which defendant "may" request. Exhibit IV is a notice of proposed assessment of penalty. This notices states that

> THE PROPOSED PENALTY(IES) WILL BECOME FINAL AND PAYABLE WITHIN 30 DAYS from the date you receive this lettr UNLESS YOU REQUEST A CONFERENCE OR HEARING in accordance with the following instructions. . . .

The notice then explains how to request a conference or hearing, and that if a hearing is requested, the coal miner must submit a check or money order in the amount of the proposed penalty. If the check or money order is not submitted with the petition, the coal miner is advised that "you may forfeit your right to a hearing." Defendant

contends that the use of the word "may" did not sufficiently warn him that his inaction would constitute a waive of his rights.

We reject defendant's argument. It is undisputed that defendant received the notices of violations and proposed assessments, but took no action except for requesting one conference. The notice of the proposed assessment of penalty stated that the penalty would become final and payable unless a hearing or conference was requested. Defendant ignored these citations. We cannot find that the use of the word "may" in the notices justifies defendant's failure to seek administrative review of the proposed penalties. To the extent that the notices were confusing, defendant should have contacted the Office of Surface Mining, as the notices suggested, or

sought legal counsel. This Court cannot sanction defendant's ignoring the citations of an agency of the Government. Defendant's failure to contest the proposed penalties through the available administratie procedures resulted in a waiver of his rights to contest the penalties at this time. 30 U.S.C. Sec. 1268(c).

Defendant's last contention is that the penalties are void because the Secretary failed to inform him of the amount of the proposed penalty within 30 days of the issuance of the violations, as required by Sec. 1268(c). We must disagree. A statutory time period is not jurisdictional unless it both expressly requires an agency to act within a particular time period and specifies a consequence for failure to comply with the provision. See Usery v. Whitin Machine Works, Inc., 554 F.2d

498, 501 (1st Cir. 1977); Fort Worth National Corp. v. Federal Savings & Loan Ins. Corp., 469 F.2d 47, 58 (5th Cir. 1972); Maryland Casualty Co. v. Cardillo, 99 F.2d 432, 434 (D.C. Cir. 1938). Since Sec. 1268(c) does not specify any consequence for the Secretary's failure to act within 30 days, the provision is not jurisdictional. Since the provision is not jurisdictional, and defendant has neither claimed nor shown any prejudice, we conclude that the penalties are not void.

For these reasons, it is ORDERED that plaintiff's motion for summary judgment be, and the same hereby is, granted. It is further ORDERED that the judgment enter in favor of plaintiff for $20,720.00

Order Acccordingly.

/s/By:Robert L. Taylor

United States District Judge

CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment 5

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. Sec. 1254. Court of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at te instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. Sec. 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. Sec. 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) ...

(b) ...

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period of not exceeding sixty days.

(d) ...

(e) ...

(f) ....

30 U.S.C. Sec. 1268. Penalties

(a) ...

(b) Hearing. A civil penalty shall be assessed by the Secretary only after the person charged with a violation described under subsection (a) of this section has been given an opportunity for a public hearing. Where such a public hearing has been held, the Secretary shall make findings of fact, and he shall issue a written decision as to the occurrence of the violation and the amount of the penalty which is warranted, incorporating, when appropriate, and order therein requiring that the penalty be paid. When appropriate, the Secretary shall consolidate such hearings with other proceedings under section 521 of this Act. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code. Where the person charged with such a violation fails to avail himself of the opportunity for a public hearing, a civil penalty shall be assessed by the Secretary after the Secretary has determined that a violation did occur, and the amount of the penalty which is warranted, and has issued an order requiring that the penalty be paid.

(c) Notice; waiver. Upon the issuance of a notice or order charging that a violation of the Act has occurred, the Secretary shall inform the operator within thirty days of the proposed amount of said penalty. The person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the

person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account. If through administrative or judicial review of the proposed penalty, it is determined that no violation occurred, or that the amount of the penalty should be reduced, the Secretary shall within thirty days remit the appropriate amount to the person, with interest at the rate of 6 percent, or at the prevailing Department of the Treasury rate, whichever is greater. Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

(d) Recovery in civil action. Civil penalties owed under this Act, may be recovered in a civil action brought by the Attorney General at the request of the Secretary in any appropriate district court of the United States.

(e) ...

(f) ...

(g) ...

(h) ...

(i) ....

30 U.S.C. Sec. 1271. Enforcement.

(a) Notice; Federal inspection; waiver; cessation order; affirmative obligations; hearing; suspension or revocation of permits; contents of notices and orders; expiration date. (1) Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this Act or any permit condition required by this Act, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. The ten-day notification period shall be waived when the person informing the Secretary provides adequate proof that an imminent danger of significant environmental harm exists and that the State has failed to take appropriate action. When the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspection is proposed to be carried out and such person shall be allowed to accompany the

inspector during the inspection.

(2) When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this Act or any permit condition required by this Act, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cesstion of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation. Such cessation order shall remain in effect until the Secretary or his authorized representative determines that the condition, practice, or violation has been abated, or until modified, vacated, or terminated by the Secretary or his authorized representative pursuant to subparagraph (a)(5) of this section. Where the Secretary finds that the ordered cessation of surface coal mining and reclamation operations, or any portion thereof, will not completely abate the imminent danger to health or safety of the public or the significant imminent environmental harm to land, air, or water resources, the Secretary shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps the Secretary deems necessary to abate the imminent danger or the significant environmental harm.

(3) When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, Federal inspection pursuant to section 502, or section 504(b) or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that any permittee is in violation of any requirement of this Act or any permit condition required by this Act; but such violation does not create an imminent danger to the health or safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or authorized representative shall issue a notice to the permittee or his agent fixing a reasonable time but not more than ninety days from the abatement of the violation and providing opportunity for public hearing.

If, upon expiration of the period of time as originally fixed or subsequently extended, for good cause shown and upon the written finding of the Secretary or his authorized representative, the Secretary or his authorized representative finds that the violation has not been abated, he shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the violation. Such cesation order shall remain in effect until the Secretary or his authorized representative determines that the violation has been abated, or until modified, vacated, or terminated by the Sectetary or his authorized representative pursuant to subparagraph

(a)(5) of this subsection, the Secretary shall determine the steps necessary to abate the violation in the most expeditious manner possible, and shall include the necessary measures in the order.

(4) When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, Federal inspection pursuant to section 502 or section 504 or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that a pattern of violations of any requirements of this Act or any permit conditions required by this Act exists or has existed, and if the Secretary or his authoried representative also find that such violations are caused by the unwarranted failure of the permittee to comply with any requirements of this Act or any permit conditions, or that such violations are willfully caused by the permittee, the Secretary or his authorized representative shall forthwith issue an order to the permittee to show cause as to why the permit should not be suspended or revoked and shall provide opportunity for a public hearing. If a hearing is requested the Secretary shall inform all interested parties of the time and place of the hearing. Upon the permitte's failure to show cause as to why the permit should not be suspended or revoked, the Secretary or his authorized representative shall forthwith suspend or revoke the permit.

(5) Notices and orders issued

to this section shall set forth with reasonable specificity the nature of the violation and the remedial action required, the period of time established for abatement, and a reasonable description of the portion of the surface coal mining and reclamation operation to which the notice or order applies. Each notice or order issued under this section shall be given promptly to the permittee or his agent by the Secretary or his authorized representative who issues such notice or order, and all such notices and orders shall be in writing and shall be signed by such authorized representatives. Any notice or order issued pursuant to this section may be modified, vacated, or terminated by the Secretary or his authorized representative. A copy of any such order or notice shall be sent to the State regulatory authority in the State in which the violation occurs: Provided, That any notice or order issued pursuant to this section which requires cessation of mining by the operator shall expire within thirty days of actual notice the operator unless a public hearing is held at the site or within such reasonable proximity to the site that any viewings of the site can be conducted during the course of the public hearing.

(b) ...

(c) ...

(d) ...

CERTIFICATE

I, David A. Burkhalter, II, a member of the Bar of the Court, pursuant to Supreme Court Rule 19 and Rule 28, hereby certify that I have served Robert S. More, Special Assistant U.S. Attorney, Department of the Interior, P. O. Box 15006, Knoxville, TN 37901, and the Solicitor General, Department of Justice, Washington, D.C., 20530, with three (3) true and exact copies of the foregoing Petition and filed with the Court forty (40) true and exact copies, properly addressed to the Clerk of the Court, by depositing same in a United States Post office, first-class postage pre-paid, or with the Knoxville terminal of Federal Express, a corporation offering overnight delivery of documents and other articles, this the 2nd day of July, 1984.

David A. Burkhalter, II

STATE OF TENNESSEE
COUNTY OF KNOX

SUBSCRIBED and sworn to before me this the 2nd day of July, 1984.

Notary Public
My Commission Expires: 7/03/84